Supreme Court of the United States

OCTOBER TERM, 1902.

No. 507.

DAVIS & FARNUM MANUFACTURING COMPANY,
A CORPORATION, APPELLANT,

vs.

CITY OF LOS ANGELES, A MUNICIPAL CORPORATION,
APPELLEE.

REPLY BRIEF ON BEHALF OF APPELLANT.

I.

May it please your honors:

If we understand the discussion of counsel for appellee in their brief, it is apparent to us that they have misunderstood the salient points of the argument which we have presented as to the validity of the ordinance in question and the power of a court of equity upon the case disclosed by the bill of complaint to prevent the enforcement of that ordinance and enjoining the city of Los Angeles from prosecutions thereunder which would thereby result in irreparable injury. We have examined the authorities cited by the counsel for appellee in their brief as to the power of a court of equity to enjoin the enforcement of void city ordinances, and, so far

as we can determine by such investigation, the essential element is lacking in those cases, namely, *that a court of equity will enjoin the enforcement of void city ordinances to prevent a multiplicity of actions or to protect the property rights injuriously affected or impaired thereby, and where irreparable damage will follow, especially where property rights are acquired under legislative authority.*

It must be borne in mind in this case that the property rights which we are seeking to protect are those acquired by legislative authority, viz:

1st. Under the rights, privileges, and franchises granted by the constitution of the State of California, article 11, section 19, providing for the use of the public streets and thoroughfares of every city in the State of California for the purpose of laying down pipes and conduits and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas-light or with other illuminating light.

2d. The passage by the city council of the city of Los Angeles, on the 26th day of August, 1901, of ordinance No. 6663, new series, establishing a district where, by implication, it was lawful to erect gas works, and the purchase of property by the employer of appellant in said district suitable for the erection of gas works, after the passage of such ordinance and for the purpose of conforming thereto; and,

3d. The granting by the board of fire commissioners on the 22d day of November, 1901, of a permit to erect gas works upon the premises thus acquired by the employer of appellant, the board of fire commissioners having been duly authorized to grant such permit by the city council of the city of Los Angeles by ordinance adopted pursuant to the charter of said city.

Hypothetical cases suggested by counsel for appellee, as illustrating their position, lack the essential element of property acquired under a constitutional grant and protection, as well as under a legislative grant. Slaughter-houses and gunpowder works have never been protected by constitutional provisions, and to use such objects, as counsel for appellee continually do in their argument, as illustrations of the lack of power of a court of equity and of the far-reaching effect of the police power, is a failure to present illustrations that affect the argument which we have presented to this court in our opening brief. No case will be found in which any of the enterprises and industries which have been condemned as being within the police power have been granted or protected by constitutional provisions. In this respect, gas and works for its manufacture, as incidental to the use of the public streets and thoroughfares in the cities of California, are *sui generis*.

As the same illustration of ordinances passed for the purpose of regulating the locality in which slaughter-houses and gunpowder works are erected is employed by counsel for appellee, both for the purpose of their argument as to the want of power in a court of equity to enjoin the enforcement of municipal ordinances in reference thereto and also as to the control over slaughter-houses and gunpowder works by ordinances and laws adopted under police regulations, we disclaim any contention on our part that slaughter-houses and gunpowder works, having to do with the public health and the public safety, are within the class of cases which are within the principles for which we contend. There are two essential features in our case—a void ordinance and property rights acquired under legislative authority attempted to be destroyed thereby. A hypothetical case might easily be put that would be a more fitting illustration of the questions presented by this case than those suggested by counsel for appellee. It might not concern the city of Los Angeles and its city attorney, nor disturb them in the least, as it is

apparent to this court they have little interest in this controversy, waiting and watching to finally espouse the cause of the one in which, in their opinion, as between these rival gas companies, their greatest profit lies. It can be said of them that, like their prototype in the old play by Marlowe, "And thus far roundly goes the business. Thus loving "neither, I will live with both, making a profit of my policy; "and he from whom my most advantage comes shall be "my friend." But to the other counsel in this case, as attorneys for the Los Angeles Lighting Company, the case we are about to present might arise as a hideous nightmare to disturb their equanimity and the peaceful security in which they have reposed hitherto. Their confidence could only be restored by the singular proofs which, as shown by the record in this case, the authorities of the city of Los Angeles have undoubtedly given to this Los Angeles Lighting Company of their abilities and faithful services.

Suppose that the Los Angeles Lighting Company, which, in this record, is charged with having a monopoly of the business of furnishing gas to the city and inhabitants of the city of Los Angeles, has a franchise from the city of Los Angeles acquired prior to the adoption of the present constitution of the State of California, in reference to the use of the streets of the city of Los Angeles for the purpose of laying pipes and conduits therein to supply the city and its inhabitants with gas, and in the district in which it was lawful to erect gas works had an establishment erected where it manufactured gas and stored it for the purpose of daily distribution to its customers, and under its franchise, from time to time, in said district, it erected other works necessary for that purpose, and while said works were erected and in process of erection suppose that the said council of the said city of Los Angeles had adopted the ordinance of March 3, 1902, leaving within the district the works that were being erected by appellant for the Valley Gas and Fuel Company and making it unlawful to erect gas works

Addenda.

Vide City of Hutchison vs. Beckham, 118 Fed. Rep., 399 (reported since this brief was prepared), wherein the circuit court of appeals, eighth circuit, hold that a court of equity will entertain a bill in the nature of a bill of peace to restrain the enforcement of void city ordinances where numerous prosecutions are threatened or instituted thereunder causing irreparable damage.

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south of Redondo street and Alhambra avenue instead of northeast thereof in said city, and thereby excluding the work of the Los Angeles Lighting Company, it might be interesting then to speculate what would be the position of the counsel of the Los Angeles Lighting Company under such a state of facts. That would be an illustration to the point. It would present a far different case than those suggested by slaughter-houses and gunpowder works. Could it be said that the Los Angeles Lighting Company, with its extensive works, supplying with gas, as it does, hundreds of customers absolutely in need thereof and dependent upon the service given by that company, having had a franchise from the city, could not receive protection from a court of equity, though the ordinance adopted was highly penal in its provisions and methods of enforcement? The position would be exactly similar to the case at bar, and we take it that from the authorities we have presented it could never be contended that the ordinance we have supposed to have been adopted could be sustained as a police regulation, and that it could never be maintained in this court that a court of equity was without power to grant the relief necessary to protect property rights acquired by legislative authority and to avoid a multiplicity of suits.

II.

In reference to the power of a court of equity to restrain the enforcement of invalid ordinances where property rights are involved, we desire to call the court's attention to the following extract from 21 American and English Encyclopedia of Law, 2d edition, 998:

"It has been frequently held that a court of equity may "by injunction restrain the enforcement of a municipal "ordinance, provided a proper showing be made to warrant "the extraordinary relief (citing *Cleveland City Railway Co.* "*vs. Cleveland*, 94 Fed. Rep., 385; *New Orleans Water Works*

"*Co. vs. New Orleans*, 164 U. S., 471; *Sylvester Coal Co. vs. St.*
"*Louis*, 130 Mo., 323, and other authorities cited by us in
"our opening brief); and though in many cases, injunctions
"for such purpose, have been denied, it will, as a rule, be
"found on an examination of the cases that the refusal was
"based upon the ground, not of a lack of power, but that the
"case presented was not such as to call for or warrant the
"interference of equity."

Another distinction is made between the power of a court of equity to enjoin the enforcement of criminal statutes adopted by the legislature and the power to enjoin the enforcement of municipal ordinances. In *Sylvester Coal Co. vs. City of St. Louis*, 130 Mo., 323–328, the court said:

"But is the remedy at law adequate? It must be re-
"membered that the injury complained of here is contin-
"ous. The ordinances are continuous, and plaintiffs' busi-
"ness is continuous, and under the ordinances for each
"wagon-load of coal sold and delivered in violation of the
"restrictive provisions thereof, the plaintiffs each be-
"came subject to an action in the municipal courts
"of the city for such violation. The fact that in each
"of said suits the plaintiffs might plead successfully
"the invalidity of the ordinances as a defense thereto
"does not give them an adequate remedy. They are
"entitled to be protected from the expense, vexation,
"and annoyance of such a multiplicity of suits in conse-
"quence of their continuance of a legitimate business except
"upon compliance with the conditions of ordinances which
"it is alleged are and may be utterly void (*Mayor, etc., vs.*
"*Radecke*, 49 Md., 217). * * * The doctrine that crim-
"inal statutes cannot be tested or their enforcement restrained
"in the civil courts has no application to the case. *Munici-*
"*pal ordinances, though penal, are not criminal statutes* (*City of*
"*Kansas vs. Clark*, 68 Mo., 588; *Ex parte Hallwedell*, 74 Mo.,

"395; *St. Louis vs. Marchell*, 99 Mo., 475. They are *quasi* "criminal in form, but not so regarded in procedure."

The same distinction between criminal laws adopted by the legislature of a State and municipal ordinances—the latter as being only quasi criminal, though penal in their method of enforcement—is recognized in the case of *Southern Express Co. vs. Mayor of Ensley*, 116 Fed. Rep., 756, quoted from in our opening brief, where Judge Jones says of such ordinances: They "are *quasi* penal only, at most. "In substance and legal effect, they are civil proceedings."

The counsel for appellee recognize the force of the authorities cited by us, and especially of the *City of Austin vs. Austin City Cemetery Association* (*supra*), in which case the supreme court of Texas recognized the fact that it was in direct conflict with the case of *Wardens vs. Washington*, 109 N. C., 21, quoted from by counsel for appellee, but counsel say that the case of the *City of Austin vs. Austin City Cemetery Association* is in conflict with the practice and procedure of the State of California. We do not wish any misapprehension by this court because of this statement of counsel for appellee. We know of no practice or procedure of the State of California in conflict with that case or with the principles for which we are contending. On the contrary thereof, the only case in California wherein the supreme court of the State of California have had occasion to discuss the power of a court of equity in these matters of restraining the enforcement of void municipal ordinances was the case of *Mock vs. The City of Santa Rosa*, 126 Cal., 333, 342, where Mr. Justice Temple, in delivering the opinion of the court, said:

"In this connection, appellants further contend that 'the "powers of a tax-payer plaintiff are limited and can be ex-"tended only to acts or threatened acts of municipal officers' "(citing High on Injunctions, section 1243). It is there laid "down that equitable interference by injunction with legis-"lative action by municipal bodies has given rise to some

"apparent conflict of authority, and is not wholly free from "doubt; that purely legislative action will not be enjoined. "But the authority further says: 'And while courts of equity "will not enjoin municipal bodies from the passage of ordi- "nances or resolutions, yet after the passage of such ordi- "nances or resolutions, the courts may and will, on a proper "case being shown, prevent their enforcement, and for this "purpose, may enjoin proceedings thereunder, which would "otherwise result in irreparable injury.'"

The case of *Fitz vs. McGhee*, 172 U. S., 516, cited by counsel for appellant, was a bill brought against the attorney general of the State of Alabama and the solicitor of the eleventh judicial circuit of that State to restrain them from prosecuting a large number of indictments found against the employés of the plaintiff. The real question involved in that case was whether or not it was not within the prohibition of the eleventh amendment to the Constitution of the United States, and it was determined by this court that it was a suit against the State. There was, therefore, no difference between that case and *Harkrader vs. Wadley*, 172 U. S., 148. Property rights acquired by legislative authority were not involved, and the discussion in reference to the power of a court of equity, like the discussion of that question in *Ex parte Sawyer*, *supra*, and *Harkrader vs. Wadley*, *supra*, is not applicable to the case at bar.

The case also of the *City of Denver vs. Beede*, 54 Pac., 624, decided by the supreme court of Colorado and relied upon by counsel for appellee in their reply brief, related solely to the question as to whether a court of equity would enjoin the enforcement of an ordinance prohibiting a Sunday performance in a theater. There were no property rights involved, and the ordinance certainly went to a question affecting public morals. There can be no property rights in a Sunday theatrical performance, and the case is not in conflict with the principles decided by the same court in *Platte and D.*

Canal, etc., Co. vs. Lee, Mayor, 29 Pac. Rep., 1036, quoted from at large in our opening brief.

III.

We do not agree with counsel for appellee that in arriving at a decision as to the validity of the ordinances in question this court must only consider them in connection with and look at them only in the light of those facts and circumstances which the law says the court may take judicial cognizance of; nor do we agree in any particular with counsel for appellee in the statement that this court will take judicial knowledge of the population of the city of Los Angeles, and that portions of it are devoted to residence purposes exclusively and are densely populated, or as to the extent of the district embraced in the ordinance No. 7029. This court has power to enquire with regard to the jurisdiction of the court or as to the validity of the ordinances to all matters disclosed in the record, even if such enquiry involves an examination of other facts than those disclosed on the face of the ordinance, or of which the court takes judicial notice.

While we may agree with counsel for appellee that gas is an extremely volatile, inflammable, combustible, explosive, and poisonous, yet we do not agree with counsel that it cannot be manufactured without giving forth offensive odors or noxious smoke, nor that it will affect the health and comfort of all the persons living in the immediate vicinity of the works, or that it is a menace to the buildings adjoining or in close proximity thereto It is distinctly alleged in the bill of complaint in this case that the works are being constructed and are being completed upon concrete foundations with a superstructure of brick and steel and iron of the best material procurable and are not combustible, and that the same are so firmly and substantially constructed that there can be no danger from explosion, bursting, or leakage; that

all the machinery now in place therein or to be placed therein is of the most approved pattern and constructed in accordance with the latest devices and improvements known in the manufacture of gas; that said works can and will be operated and maintained by the said Caroline W. Dobbins, by the use of said devices and improvements and the said machinery therein contained, so that there will be no leakage or escape of odors, and that the same will not create a nuisance and will not interfere with the health, comfort, safety, or welfare of the inhabitants of the district and territory in which the gas works are located, or of any other inhabitants of said city of Los Angeles. These allegations are admitted by the demurrer.

In the case of *Cleveland vs. Citizens' Gas Light Co.*, 20 N. J., Eq., 201, quoted from by counsel for appellee, the allegations of the complaint were similar to those in this case, that the process of manufacturing gas to be used was free from any objectionable characteristics. That case did not involve any municipal ordinance, for never in the history of this country, so far as we have been able to ascertain, has any municipality heretofore attempted to prevent the erection of gas works on the theory that they would be a nuisance when erected, or even to declare existing gas works a nuisance. In that case the plaintiff sought an injunction to restrain the erection of the works and also manufacturing the gas. The court said that the building itself could be an injury to no one, if gas was never made in it, and the chancellor was not entirely satisfied that it was impossible to manufacture gas in some way that would not be a nuisance to persons situated as those of the complainants. Therefore he did not feel justified in restraining the erection of the buildings, but permitted the defendants to use their own discretion in going on with them, if they chose to do so, after hearing the views entertained of the rights of the complainants and others in like situation; referring to the right to bring an action to restrain a private nuisance.

IV.

In order to justify this ordinance as a police regulation, it must have a real and substantial tendency to affect the public health, comfort, or safety of the city of Los Angeles, regardless of the manner in which the business in question is conducted. It is not sufficient that any business or occupation, if negligently managed or recklessly conducted, will injure the public health or affect the public safety and comfort. This will not justify a municipal legislative body in prohibiting that business or occupation from being properly conducted in the particular locality, for it is difficult to conceive of any business, trade, or occupation which could not be so conducted, under reckless and wanton management, as to in some degree affect the health of the public. It cannot be said that the making of gas or the storage of it regardless of the methods which are employed to guard against its escape is an occupation which should be suppressed upon the theory that it affects the health of the community. Every city in the United States of any size has within its limits a gas plant in active operation, and yet the books are silent as to a single case in which the operation of a gas plant has ever been declared to be a nuisance, public or private.

The only element of danger in the possession of illuminating gas lies in its improper or negligent use, and we submit that it is not competent to exterminate it on the supposition that the public is going to negligently and improperly use that which has grown to be one of the most essential of modern comforts and conveniences. If the public health is endangered at all by the manufacture and distribution of gas, that danger lies, not at the gas works, but in the houses through which it is distributed and where the opportunity for negligent use presents itself; and yet the constitution of the State of California, recognizing the public necessity,

confers upon appellant's employer the right to distribute gas, and thereby it deprives the municipal corporation of the opportunity to prohibit that portion of the gas business which can be said to affect even remotely the public health.

If the ordinance be justified on the ground of the safety of the public, the same considerations apply. In the history of gas-making of the United States, extending over a period of nearly one hundred years, there is not a single case on record where a gas tank or gas works have caused an explosion, and for the simple reason, of which, we think, the court may properly take judicial notice, that gas, as it is stored in the tanks of the gas companies and distributed through their mains, is absolutely non-explosive. It is inflammable, but it is for its qualities of inflammability that the constitution of the State of California protects it from just such legislation as this on the ground of public necessity for its use.

Under the head of health or comfort it is claimed that the power to prescribe the localities within which slaughter-houses and meat markets may be conducted is determinative of the validity of the ordinance under review. As to slaughter-houses, we concede that it is within the police power to absolutely prohibit their maintenance within the city. The tendency to produce disease caused by the excreta from living animals and the putrefaction of animal matter which, especially in warm climates, takes place with great rapidity would seem to create a shadowy parallel to the gas-making industry, and it is but natural that New Orleans, with her climatic conditions, should have furnished much of the law on this subject. In one of the earliest cases in Louisiana, discussing this question, the court say: "By way of illustrating this necessarily existing power to "regulate the number, location and management of markets, "take the city of New Orleans, *in a warm climate*, located in "a low district of country, surrounded by marshes and "swamps, which in the hot season under favorable condi-"tions envelops its large population in a malarious atmos-

"phere. Under such circumstances the danger of epidemics "becomes imminent. It behooves the city authorities at "such periods to be on the alert to obviate the local causes "of disease within the limits of the city. Among such "causes the decay of animal and vegetable matter is a prom- "inent one. The markets, therefore, must on that account "be strictly attended to, and such measures adopted in "regard to them as in the judgment of the proper authori- "ties the public health may require."

New Orleans vs. Stafford, 27 La. Ann., 417.

There are many cases in which the power to regulate the location of markets has been exercised in which it was undoubtedly justified on the theory that it facilitated the inspection of the food products there offered for sale. The supreme court of Michigan considered an ordinance prohibiting the establishment of markets in the city of Detroit outside of the public markets, and they say: "The power to "license and regulate the vending of meats and vegetables "is not denied, nor is its necessity questioned. The health "of the city demands that it should exist. If the power to "regulate exists, then the city has the power to prescribe the "limits within which the trade or calling shall be carried on "without a license. If carried on elsewhere the city may "require the license and bond for protection and regulation, "and may require such reasonable fee *as will compensate* "*either partially or fully for the expense of inspection and regu-* "*lation thereby incurred.*"

Ash vs. People, 11 Mich., 352.

It would seem that many of the cases outside of the Southern States which support the power to regulate markets proceed upon the theory, not that they are of themselves injurious to the public, but that for the purpose of facilitating inspection the city may group them together. The fact is also worthy of note that all of these cases concerning the

right to prescribe the locality in which meat shall be sold at retail arose years ago, when most of the cities in which the ordinances were adopted were but little larger than country villages. Were the question to be raised today as to whether or not the cities of Los Angeles or San Francisco could shut up all the meat markets outside of a given block, it might receive a very different consideration. The *reasonableness* of such a police regulation and the necessity for its passage under existing considerations would perhaps appeal so slightly to the court as to render a conclusion different from that arrived at in early cases a possibility.

"*Cessante ratione legis cessant et ipsa lex.*"

The welfare of the community embraces a large number of cases which have no application here, and which may be said to provide restrictions or regulations affecting the public morality. Under this branch of the police powers may be grouped the lottery cases, the gambling cases, the brothel cases, and the cases involving the right to carry on the liquor traffic.

The initial ordinance of August 26, 1901, is one of the most far-reaching and extreme attempts to interfere with the lawful use of property that has ever been made by any municipal council in the State of California. The antipathy to the Chinese instigated the passage of many ordinances, which culminated in the Stockton laundry ordinance case, the decision in which case was much criticised at the time, but which has since been adopted by the supreme court of California in the *Sing Lee* case, *supra*, and followed in the *Hong Wah* case, 82 Fed., 623. But this race hatred resulted in no ordinances which required the recognition of unlimited powers to control private property, as those ordinances were attempted to be justified solely on the ground of being sanitary measures. But here the city of Los Angeles is in the position of saying that it may ostensibly regulate, but in fact exterminate, a lawful industry, and one which is encouraged by the constitution of the State of

California upon the ground that the fruits of that industry, if negligently and improperly used, will result in affecting not alone the health of the person who negligently employs the product, but of the entire community, on the theory that where one is negligent all may be, and in this case will be. If this is law there is not a business or occupation carried on within the city limits, the toilers in which may be classed as "productive laborers," where the same rule would not apply. They would regulate or exterminate drug stores, grocery stores, dry-goods stores, or any other lawful business or any manufacturing establishment. Such a condition, it seems to us, would be intolerable and utterly foreign to any judicial interpretation, however liberal, of the police powers.

We do not wish to be understood by this court as asserting that the municipal council cannot provide for the use of the very latest improvements in gas-making, and compel, by any reasonable regulation, a compliance with the methods of manufacture which are employed in all modern gas works to prevent the escape of gas in any quantity whatever, or to prohibit whatever else may be obnoxious as the result of negligent management or insufficient appliances. We would be glad to have the city of Los Angeles preserve the public health and the public welfare by such an ordinance as that, and if it were made to apply to all of the existing gas plants in the city of Los Angeles we have no doubt it would do much, if uniformly enforced, to destroy the impression in the mind of our adversaries that there is any necessity whatever for making gas under the most improved methods, either by a "soulless corporation" or any one else, in such a way that any odors can escape. What we do earnestly insist is that the city of Los Angeles has not nor has the State itself power to limit our right to use property for a lawful pursuit and to engage in a lawful business of erecting gas works, and that the discriminatory character of this ordinance in prohibiting the employer of appellant,

Mrs. Dobbins, from using her property, purchased in a district devoted almost exclusively to manufacturing interests and according the coveted privilege to her neighbors a short distance away, be asserted by this court.

There is nothing, either in the constitution of the State of California or in any provision of the city of Los Angeles, granting police powers in excess of those which States or municipalities exercised prior to their respective adoption. It is noticeable that among the enumerated industries that may be regulated as police regulations under the city charter of the city of Los Angeles, which are set forth in full in appellee's brief, no mention is made of gas works or of the place in which they shall be located.

What we contend for is the very principle that distinguishes the case at bar from the reasoning in the case of *Powell vs. Pennsylvania*, 127 U. S., 68, namely, that the ordinances in question have no real or substantial relation to the public health, the public safety, the public comfort, or the public morals, and are not therefore police regulations. Instead of this court being able to determine from the face of the ordinances that they are valid as police regulations, because of affecting the public safety, or the public health, or the public comfort, there is nothing appearing on the face of the ordinances which would lead this court to any such conclusion.

V.

We are not sure that we understand counsel for appellee correctly that if this ordinance of March 3, 1902, is a valid ordinance and can be enforced against any person, that therefore the ordinance would be constitutional under all considerations and conditions; but if we do understand counsel correctly in this respect, we can only say that it would be introducing into constitutional law a somewhat novel doctrine and make every retroactive statute that did not so

appear upon its face of full force and effect unless void for some other constitutional reason. The contention of counsel simply ignores the doctrine of vested rights. Vested rights would never be apparent on the face of the ordinance or statute and not always within the range of matters of which a court could take judicial cognizance; and yet the counsel would have this court hold that because it did not appear upon the face of the ordinance or in the range of matters of which the court could take judicial cognizance, although there were vested rights acquired prior to the passage of the ordinance, that therefore the ordinance was constitutional and valid.

It must be apparent to this court that this is not a controversy altogether between the appellant and the appellee herein, but is rather a controversy between the Valley Gas and Fuel Co. and Mrs. Caroline W. Dobbins, on the one hand, and the Los Angeles Lighting Co., on the other, and that the determination by this court that the appellant herein has vested rights acquired prior to the passage of the ordinance of March 3, 1902, is the determination that the Valley Gas and Fuel Co. and Mrs. Dobbins had vested rights acquired prior to the passage of that ordinance. The appellant has an equitable interest in the vested rights granted to Mrs. Dobbins to the extent that it was carrying out the contract of erecting the gas works, and thereby was to derive the benefit and profit of its work in so doing. Profits are as much property and the right thereto as much a property right as those to be derived from the subsequent ownership and operation of the works erected under the contract. The extent of these profits is immaterial; the rights interfered with and which the appellant would be compelled to relinquish by prosecutions under an invalid ordinance are the same.

It is not clear, as claimed by counsel for appellee, that under the allegations of the bill of complaint in this case appellant can recover for work done upon the gas works prior to the enactment of the ordinance in question, or that

it can insist upon its right under its contract to erect those works in the city of Los Angeles upon premises to be designated by Mrs. Dobbins or the Valley Gas and Fuel Company where it was lawful to erect the same at the time the contract was entered into for their erection, September 17, 1901. The contract between appellant and the Valley Gas and Fuel Company and Mrs. Dobbins was entered into on the 17th day of September, 1901, with a view, as to the place of erection of said works, to the ordinances then in force in the city of Los Angeles. The contract was an entirety, and, as is alleged in the bill of complaint, payment therefor was to be made "upon the delivery of said works complete." The doctrine of the inviolability of contracts protects them against legislative assaults, whether they are entered into by the leave, license, or permission of the public authorities or not; and even without so much as notice to the public authorities that such contracts had been entered into.

In construing the doctrine of vested rights as applied to the police powers, a distinction has been recognized between those things which are nuisances, necessarily and regardless of the manner of their use and enjoyment, and, on the other hand, certain changed conditions, which may take unto themselves the character of a nuisance, and justify an immediate and drastic regulation on the part of the municipal authorities. Vested rights in those things which are nuisances *per se* can never be protected against a municipal ordinance requiring their abatement; but it has never been contended successfully that where a wooden building has been erected without a fire limits, and the municipal council later changed the district so as to include the property on which the wooden structure was erected, the authorities could compel the destruction of the building, merely because a wooden building in that locality might, in the event of a conflagration, affect the safety of the community. The owner of the wooden building, by reason of its lawful erection

under existing regulations of the municipality, acquires a vested right in its maintenance, which is subject only to the power of the city to condemn it as a nuisance, if such it becomes, or to blow it up or otherwise destroy it, should the actual necessity, by reason of a conflagration, exist. Do we not stand in the same relation to the city of Los Angeles? The city council prescribed a district within which gas works might be erected. They virtually invited us and all others who contemplated entering the business to go into that district and secure thereby the protection of the city in the prosecution of our lawful undertaking. Appellant's employers accepted the invitation, purchased land for the purpose of building a gas plant within the favored district, entered into numerous contracts on the faith of the alleged municipal ordinances as they then existed, and spent large sums of money in the prosecution of their undertaking, and then the council amended the ordinance, cutting out a suspiciously small piece in the northern end of the district, excluding from it a territory which contains many "objectionable trades," enumerated in the bill of complaint, and thereby attempted to stamp with the character of outlawry the effort of appellant's employer to supply the citizens of the city of Los Angeles with gas and to give them competition in a business which has never been determined by the courts to be in any sense noxious, offensive, or injurious to the public health.

The doctrine of vested rights as against the attempted exercise of the police power under certain conditions certainly exists, and it would be difficult to imagine a more inequitable or unconscionable condition of affairs than that a munipal legislative body should have the power to invite to their financial ruin those who are attempting to participate in the manufacture of gas. If they can amend the district once they can continue to amend it, and in that way effectually and for all time prevent any particular individual from ever entering the business.

We respectfully submit that from the mass of cases defining and limiting the scope of the police powers the principles of common honesty, common justice, and reasonableness will support the application of the vested-rights theory to the case at bar. We are not dealing in speculative theories as to the probable action of the council in the future or as to any presumption concerning their reasonable exercise of all their legislative functions, for the condition disclosed in the complaint is one which the exercise of their legislative functions has brought into existence. If their right to change the outlines of the district under this state of facts is sustained, and the future is to be judged by the past, the exterior boundaries of the limits within which gas works may be erected will become so flexible and incapable of determination as to completely deter the investment of capital in this most important industry, and it must inevitably result in vitally affecting the broader and more comprehensive interests of the public in securing competition in the supply of public utilities.

If vested rights are not to be considered, whenever municipal authorities seek to justify their action under an alleged exercise of the police power, other useful industries will be loath to enter the boundaries of municipal corporations and be subject to the tyranny of municipal authorities. One of the most useful industries in our cities of the present day is that of generating and conducting electricity to the citizens in their homes and to the public generally for power and transportation purposes. It cannot be doubted that electricity of the voltage which is ordinarily transmitted along our city streets is a highly dangerous element. Where one person is injured through inhaling gas, a hundred are instantaneously killed by the too frequent grounded circuit. If the city council of the city of Los Angeles should pass an ordinance prohibiting the generation of electricity, except within a certain district in the city of Los Angeles, would it have any substantial relation to the health or safety of the

community, and if having passed such an ordinance, assuming that it would be valid, and prospective investers should within the favored district commence the erection of a plant capable of generating electricity in large quantities, would they not have acquired vested rights which would protect them against a change in the outlines of the district? The modern gas plant is less objectionable than the large steam plants which exist in all our cities for the generation of electricity. It is certainly no more of a nuisance, and it possibly is a little less, for the reason that the modern gas plant is built for the purpose of utilizing all the products of combustion. The constitutional grant of police powers in the State of California is not sufficient to give any city power to prohibit the generation of electricity simply because the product of the efforts of those engaged therein may and in many cases does most seriously affect the health and the life of individual inhabitants of the city. We think that the manufacturers of gas are at least on the same plane with the generators of electricity; that the product of each is a necessity of modern civilization; that the municipality may regulate, by all reasonable provisions, the methods which shall be employed in furnishing the citizens with the product of their efforts to compel the use of the latest appliances and devices to secure the greatest degree of safety and comfort in their use, and to compel, in the manufacture of both gas and electricity, every safeguard known to modern science; but the city authorities have no authority in reference to either the persons generating the electricity for power or light or manufacturing gas to establish a district in which it is lawful to erect their works, invite them there to spend thousands of dollars in the erection of their establishments, and then suddenly change the boundaries of the district respecting neither vested or any other rights.

VI.

There is considerable discussion in the brief on behalf of appellee as to the validity of the permit granted to Mrs. Dobbins by the board of fire commissioners on the 22d day of November, 1901. The facts in reference to the granting of that permit are set forth in the bill of complaint. Counsel for appellee assert that the bill of complaint does not disclose the authority of the board of fire commissioners to grant the permit. The city ordinances in reference to this matter and the powers conferred upon the board of fire commissioners by their charter are set forth in our original brief, but the method of procedure before the board of fire commissioners is all set forth in the bill of complaint, and the allegation is made that the board of fire commissioners had power to grant or refuse the permit. These facts are admitted by the demurrer. The board of fire commissioners, under the building ordinances, had authority to grant the permit, and so voting to grant the permit the resolution adopted was a permit in itself.

No formal resolution of acceptance was necessary and it was not necessary to formally issue a permit after the adoption of the resolution that the permit be granted. That would simply be a ministerial act (*City Railway Co. vs. Citizens' Street Railroad Co.*, 166 U. S., 557, 568).

VII.

Much has been said by counsel for appellee in their brief as to the fact that the appellant would not suffer by the enforcement of the ordinances in question because, as they allege, the city of Los Angeles would be responsible in damages, in a suit at law, for all injuries that might be sustained by the enforcement of the ordinances if invalid, and therefore appellant has an adequate remedy at law. Counsel for appellant entirely overlook the fact that the appellant

has no remedy against the city of Los Angeles for damages, and we again call the attention of this court to the authorities that we have cited in our opening brief in support of the proposition that, in the absence of a statutory provision in the State of California imposing the liability, a municipal corporation is not liable for the misfeasance, malfeasance, or non-feasance of its officers.

VIII.

In concluding this argument we desire to lay especial stress upon the provisions of the constitution of the State of California, article XI, section 19, in reference to the use of the public streets for the purpose of supplying the cities and their inhabitants with gaslight and other illuminating light. We have presented this matter at large in our opening brief and as to what we claim were the incidental rights acquired under this provision of the constitution. The ordinances in question make it unlawful to have any tank, reservoir, or receptacle for the storage of gas in any portion of the city of Los Angeles outside of the district described in the ordinance. In this respect the ordinance is absolutely void and in contravention of this provision of the constitution of the State of California. There is more gas stored in the pipes in the street than in all the holder-room that it might be necessary for any gas company to have attempting to supply a city larger than the city of Los Angeles. The judicial interpretation of this section of the constitution of the State of California, which is sought for by counsel for appellee, is easily found in *Ex parte Johnston*, as cited and quoted largely by us in our opening brief, where the supreme court of the State of California expressly say that it is not within the power of the municipal authorities to abridge any of the rights granted thereby; nor are we confined to a strict construction of that section of the constitution which entitles us to all privileges that may by a liberal intendment be derived therefrom.

Too much stress cannot be laid upon the principles enunciated by the supreme court of the State of California in the opinion of the learned Justice Harrison in this case of *Ex parte Johnston*. Not only is the decision in that case far reaching in its effect as interpreting the provision of the constitution of the State of California now under discussion, but as determinative of the case at bar in so far as it is determined thereby that it is not within the power of the municipal authorities to curtail or abridge any of the privileges granted by that constitutional provision. Under this authority the ordinances in question are an attempt on the part of the municipal authorities of the city of Los Angeles to curtail and abridge the rights and privileges of those engaged in the gas business in that city. By the same authority these ordinances are not police regulations. They are therefore void, and their enforcement should be enjoined by a court of equity as an attempt to enforce submission to lawless demands and to compel the relinquishment of property rights by prosecutions threatened or instituted for alleged crimes under color of such invalid ordinances.

The decree of the circuit court should be reversed, with instructions to grant the preliminary injunction prayed for in the bill of complaint.

Respectfully submitted.

HENRY T. HELM,
LYNN HELM,
EDWARD C. BAILEY,
HENRY T. LEE,
J. R. SCOTT,
Solicitors for Appellant.